Supreme Court, U.S.
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No. 94-690

IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1994

GRACE INVESTMENT COMPANY, an Arizona corporation;
CANADIAN IMPERIAL BANK OF COMMERCE,
a foreign corporation,
*Petitioners,*

v.

RED MOUNTAIN MACHINERY COMPANY,
an Arizona corporation,
*Respondent.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

# BRIEF IN OPPOSITION

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## PARTIES

Respondent Red Mountain Machinery Company is a corporation with no parent companies or subsidiaries to disclose pursuant to Rule 29.1, Rules of the Supreme Court.

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**BRIEF IN OPPOSITION**

Respondent respectfully prays that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed July 18, 1994, be denied.

## 1. STATEMENT RESPECTING JURISDICTION

Petitioners correctly note that the judgment below was entered by the Ninth Circuit Court of Appeals on July 18, 1994. Petitioners mistakenly claim, however, that 28 U.S.C. § 2101(c) and Rule 10 of this Court's rules provide the basis for jurisdiction in this case. Section 2101(c) only prescribes the time for filing a petition for certiorari; Rule 10 simply sets forth various general considerations pertinent to the exercise of certiorari jurisdiction. Presumably, Petitioners rely on the jurisdiction conferred by 28 U.S.C. § 1254 — the statute which permits review by certiorari of "[c]ases in the courts of appeals." This case, however, was no longer "in" the court of appeals when the petition was filed.

Following entry of judgment in the Ninth Circuit Court of Appeals, Petitioners took no steps to stay that court's mandate pending the filing of their petition for certiorari. *See* Rule 41(b), Fed.R.App.P. The mandate therefore issued on August 9, 1994, and the case was remanded to the United States District Court for the District of Arizona for further proceedings. The petition for certiorari was not filed until October 17, 1994, more than two months later. The case has since been remanded by the District Court to Yavapai County Superior Court by Order dated October 24, 1994 (*See* Appendix, p. 27 (A-27)). This case cannot still be considered to be "in the court of appeals"

for purposes of 28 U.S.C. § 1254, and therefore falls outside the Court's certiorari jurisdiction. [1]

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[1] *See* part 4.1 of this Brief for additional discussion of the jurisdictional issue.

## 2. STATEMENT OF THE CASE

### 2.1 Facts

On October 7, 1988, Petitioner Grace Investment Company ("Grace") entered into a real estate lease with the Yavapai-Prescott Indian Tribe (the "Tribe"). The Tribe is a federally recognized and protected Indian Tribe, and the lease was entered into pursuant to, and in compliance with, federal statutes and regulations applicable to leases of Indian Lands. 25 U.S.C. § 415(a) (1993); 25 C.F.R. Part 162 (1993). The lease had an initial term of 65 years, renewable for an additional 20 years at Grace's option, and covered approximately 30 acres of Reservation land near Prescott, Arizona.

The purpose of the lease was to facilitate development of multiple-use facilities on the property, including retail, office, lodging, and recreational buildings. Grace was responsible for paying the cost of all construction on the project. In addition, Grace was required "to guarantee completion of the improvement and payment in full of claims of all persons for work performed on or materials furnished for construction." In order to do so, Grace entered into a construction loan agreement with Petitioner Canadian Imperial Bank of Commerce (the "Bank"). The loan was secured by a mortgage upon Grace's leasehold interest in the project.

By entering the lease, the Tribe granted to Grace the "quiet and undisturbed continued possession of the premises" for the term of the lease. The Tribe also agreed that

Arizona law would apply to most controversies relating to the property. The lease states:

> Lessor agrees that this lease (as it applies to the subject property), and any encumbrances thereof, and any subleases, assignments or other contracted agreements with respect thereto (hereinafter collectively referred to as the "Legal Documents") shall be construed in accordance with the substantive law of the State of Arizona except in instances where the laws of the United States must govern (except to the extent that such United States law incorporates Tribal law or custom), in which instances the Legal Documents shall be construed in accordance with and governed thereby.

A-15, Lease Agreement, p. 42. The Tribe specifically agreed that any dispute between Grace and any other non-Indian parties, which might affect Grace's leasehold interest, would also be subject to the substantive laws of the State of Arizona.

> Lessor agrees that any encumbrancer of Lessee's interest or that of any sublessee or assignee and the rights of any encumbrancer with respect thereto (including, without limitation, any rights dealing with any sale, foreclosure or other enforcement of (or under) any security instrument, or executed and delivered in connection therewith) may be

> governed by the laws of the State of Arizona or, to the extent applicable, the laws of the United States.

A-16, Lease Agreement, pp. 43-44. The lease was duly executed by the president of the Tribe and the president of Grace, and was approved by the Secretary of the Interior (the "Secretary"), through his authorized representative.

Early in the lease term, Grace undertook to develop a portion of the property into a commercial shopping center called Frontier Village. Grace contracted with a company known as Tempe Trenching to provide certain on-site and off-site water and sewer systems for Frontier Village. Tempe Trenching, in turn, contracted with Respondent Red Mountain Machinery Company ("Red Mountain") for rental of the equipment necessary to perform its contract with Grace. At the conclusion of its work on Frontier Village, Tempe Trenching owed Red Mountain $55,872.14 in unpaid rental charges. Tempe Trenching went out of business and eventually filed a "no-asset" Chapter 7 bankruptcy without paying Red Mountain's claim. As a result, Red Mountain recorded a claim of lien against Grace's interest as lessee, as permitted by Arizona's mechanics' lien law.[2]

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[2] Arizona Revised Statutes § 33-981 (reproduced at A-5 of the Appendix) grants the right to claim such a lien to any person or entity supplying labor, machinery, or materials in connection with a construction project. When the project is under the control of a lessee of the real property, such as Grace, only the leasehold interest of the lessee (and not the fee interest of the lessor) is subject to the lien. *Demund Lumber Co. v. Franke*, 40 Ariz. 461, 14 P.2d 256 (1932). The claim of an entity, such as Red Mountain, renting equipment for use on a construction project, is within the protection of the statute. *Arizona*

## 2.2 Proceedings in the Lower Courts

On October 22, 1991, Red Mountain filed an action in the Superior Court of the State of Arizona for Yavapai County to foreclose its lien. Petitioners Grace and the Bank were the only defendants named in the Complaint. The Complaint sought foreclosure only against the property of Grace — i.e., the leasehold interest in the Frontier Village shopping center. The Bank was joined as a defendant because the mortgage it holds on Grace's leasehold estate is junior to Red Mountain's lien under state law. The Complaint did not seek foreclosure upon the underlying real estate, and did not join the Tribe as a Defendant.

Grace and the Bank removed the action to federal court under 28 U.S.C. § 1441, asserting federal question jurisdiction under 28 U.S.C. § 1331. They then moved for judgment on the pleadings, claiming that federal Indian law preempted application of the state law claim of Red Mountain. Treating the motion as a motion for summary judgment, the District Court sustained Petitioners' preemption argument and dismissed the action.

Red Mountain took a timely appeal to the Ninth Circuit Court of Appeals, which had jurisdiction of the matter under 28 U.S.C. § 1291. On July 18, 1994, the Ninth Circuit reversed, holding that the Secretary of the Interior and the Tribe, as permitted under the relevant regulations, had approved the application of Arizona's lien

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*Gunite Builders, Inc. v. Continental Casualty Co.*, 105 Ariz. 99, 101, 459 P.2d 724 (1969).

law in this case. The Ninth Circuit remanded the case to the District Court to adjudicate the validity and amount of Red Mountain's lien.

The mandate was issued by the Ninth Circuit on August 9, 1994, returning the litigation to the District Court. On September 28, 1994, Red Mountain filed a motion to remand the action to state court.[3] While this motion was pending, on October 17, 1994, the Petition for Certiorari was filed in this Court. On October 24, 1994, the District Court granted Red Mountain's motion and remanded the action to the Superior Court of Arizona for Yavapai County.

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[3] With the Ninth Circuit having resolved the preemption issue, only state law issues remain for adjudication by the District Court. Accordingly, Red Mountain argued that remand of the matter to the state court from whence it had been removed was appropriate under 28 U.S.C. § 1367(c).

## 3. ARGUMENT

### 3.1 Petitioners Have Improperly Invoked This Court's Certiorari Jurisdiction.

This Court's appellate jurisdiction over the courts of appeals is established by 28 U.S.C. § 1254. The statute provides, in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

This Court has consistently held that in order for jurisdiction under this statute to exist, the case must be "properly 'in' the court of appeals when the petition for certiorari [is] filed in this Court." *United States v. Nixon*, 418 U.S. 683, 690 (1974). *Accord: Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982) (where district court's interlocutory order was appealable under "collateral order" doctrine, "the case was 'in' the court of appeals under § 1254 and properly within our certiorari jurisdiction."); *House v. Mayo*, 324 U.S. 42, 44 (1945) (statutory certiorari was unavailable because the case had never been "in" the court of appeals, given the lack of a certificate of probable cause required under statute governing habeas corpus appeals). *Compare Davis v. Jacobs*, 454 U.S. 911, 914 (1981) (Stevens, J., respecting

denial of petitions of writs for certiorari) (recognizing that "the petitioner has incorrectly invoked our jurisdiction under 28 U.S.C. § 1254" where the case was not "in" the court of appeals); *with Jeffries v. Barksdale*, 453 U.S. 914, 915-16 (1981) (Rehnquist, J., dissenting from denial of certiorari) ("Since there was no certificate of probable cause issued in this case, it was never 'in' the court of appeals. . . . Since the case was never in the court of appeals we cannot review it by writ of certiorari to that court.").

There is no dispute that this case was, for a certain period of time, properly "in" the court of appeals. The District Court entered a judgment which was final for purposes of jurisdiction under 28 U.S.C. § 1291, and Red Mountain timely appealed. The problem, however, is that the Petitioners allowed the case to leave the court of appeals before they filed their petition for a writ of certiorari. They did not seek a stay of the Ninth Circuit's mandate pending the filing of their petition, as expressly contemplated by Rule 41(b), Fed.R.App.P.[4] As a result, the mandate issued,

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[4] Under Rule 41(b), the court of appeals may stay its mandate pending the filing of a petition for certiorari in this Court. If the petition is filed before the stay expires, the stay is automatically extended until disposition of the petition. Although the stay is ordinarily limited to a period of 30 days, the court of appeals may grant a longer stay "for cause shown." The rule is thus entirely consistent with the operation of 28 U.S.C. § 2101(c), since the court of appeals could, upon a proper showing, extend the stay of its mandate for the full 90 days permitted for the filing of a petition for certiorari. The drafters of the Federal Rules of Procedure expressly recognized that Rule 41 would, as a practical matter, often require the filing of a petition in less than 90 days from the issuance of the appellate court judgment. "Although 28 U.S.C. § 2101(c) permits a writ of certiorari to be filed within 90 days after the entry of judgment, seven of the eight circuits which now regulate the matter stays

bringing the proceedings "in" the court of appeals to a close. *Ostrer v. United States*, 584 F.2d 595, 598 (D.C. Cir. 1978) (issuance of the mandate "removes [the case] from the jurisdiction" of the court of appeals).

Because this case was not "'in' the court of appeals when the petition for certiorari was filed," *United States v. Nixon, supra*, 418 U.S. at 743, the writ should be dismissed for want of jurisdiction.

3.2 The Petition Does Not Raise an Issue Which Merits Plenary Review.

Even assuming jurisdiction is proper, the petition fails to show why a writ of certiorari should issue. None of the general grounds for granting a petition, as set forth in Rule 10, Sup.Ct.R., are present: Petitioners do not claim that the Ninth Circuit's decision is in conflict with any decision of this Court, any other circuit court, or the high court of any state. Petitioners do not allege that the lower court "has so far departed from the accepted and usual course of judicial proceeding" that "an exercise of this court's power of supervision" is required. Nor does the case present "an important question of federal law which has not been, but should be, settled by this court."

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pending application for certiorari limit the initial stay of the mandate to the 30-day period provided in the proposed rule." *Advisory Committee Note*, Rule 41, Fed.R.App.P., 43 F.R.D. 119, 157 (1967).

Petitioners simply disagree with the result reached below. That result, however, was compelled by both federal regulation and the terms of the lease at issue in this case. Federal regulation requires that leases of Indian land must provide a means of assuring payment of the claims of laborers and suppliers. The lease here unmistakably contemplated the filing of lien claims encumbering the project, and specifically required Grace to pay all such claims. The lease also afforded to *all* encumbrancers the benefits and protection of the state law of Arizona.

The Tribe, the Secretary, and the Petitioners themselves all agreed to the terms of the lease. Since the Secretary has express authority to approve the application of state law "in specific cases," 25 C.F.R. § 1.4(b), the fact that the Secretary approved this lease disposes of the preemption argument. As the Ninth Circuit quite properly held, on the facts of this case, the foreclosure action brought by Red Mountain against Grace and the Bank is not preempted by federal Indian law.

### 3.3 The Ninth Circuit Correctly Found That Red Mountain's Lien Foreclosure Action Was Authorized Pursuant to the Secretary's Regulatory Authority.

There is no argument that federal law preempts most state laws affecting activity on Indian land. *See generally*, W. Canby, *Civil Jurisdiction on the Indian Reservation*, 1973 UTAH L. REV. 206, 207-08. However, this Court "long ago departed from the 'view that the laws of [a state] can have no course within reservation boundaries.'" *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1390

(9th Cir. 1987), *quoting White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980). Moreover, the Secretary may "adopt or make applicable to Indian lands all or any part" of any state law, "in specific cases or in specific geographic areas," as may be found to be "in the best interest of the Indian owner or owners in achieving the highest and best use of such property." 25 C.F.R. § 1.4(b).

The fundamental holding of the court of appeals in this case was simply that the Secretary had exercised the authority granted to him under 25 C.F.R. § 1.4(b) to make Arizona's mechanics' lien applicable to disputes between non-Indian developer Grace and its non-Indian subcontractors such as Red Mountain. As the Ninth Circuit explained:

> The lease between Grace and the Tribe, which was approved by the Secretary, specifically adopts the Arizona mechanics' lien provision by providing that Arizona law would apply to controversies related to the Frontier Village project:
>
> > *Lessor agrees that this lease . . . and any encumbrances thereof*, and any subleases, assignments or other contracted agreements with respect thereto *. . . shall be construed in accordance with the substantive law of the State of Arizona.*

*Red Mountain Machinery Co. v. Grace Investment Co.*, 29 F.3d 1408, 1411 (9th Cir. 1994) (emphasis original). The Ninth Circuit went on to note that the lease generally "provides that disputes between Grace and other non-Indian parties . . . may be subject to state law." *Id.* As a result, the Ninth Circuit concluded that "by approving the lease that contained these provisions, the Secretary contemplated and authorized enforcement of mechanics' liens by foreclosure against the leasehold pursuant to Arizona law." *Id.*

The Ninth Circuit was also correct in concluding that application of the state mechanics' lien laws was in harmony with the policies reflected in federal regulation of leases of Indian lands. Prior to 1955, federal law permitted only short-term leases of Indian land, and generally under limited conditions. *See* Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1068-75 (1974). These restrictions "discouraged lessees from obtaining long-term construction financing and had thus foreclosed uses of land which required substantial investment." *Id.* at 1074-75.

With legislation enacted in 1955, PUB. L. NO. 255, CH. 615, 69 STAT. 539 (codified at 25 U.S.C. § 415(a)), modern federal policy favoring long-term Indian land leases began to take shape. The 1955 Act permitted leasing of all Indian land for up to 50 years, for a wide variety of commercial, industrial, and residential purposes. *Id.* Congress chose to encourage construction and development through long-term leases, as a means to increase Indian income. Chambers & Price, *supra*, 26 STAN. L. REV. at 1074.

Ensuring compensation to the workers and subcontractors who contribute to such construction projects furthers this goal. Accordingly, federal regulation requires the lessee to provide assurances, satisfactory to the Secretary, that the claims of subcontractors and suppliers will be paid. 25 C.F.R. § 162.5(c) (1992).[5] When suppliers and subcontractors on one project are promptly paid, they and others are encouraged to bid aggressively on future developments on leased Indian land. The long-term result is to keep the costs of such development competitive, thus furthering the Congressional goal of promoting commercial leasing of Indian land.

Grace's effort to prevent supplier Red Mountain from being paid is contrary not only to federal regulation, but also to its own agreement with the Tribe. The lease in this case complied with 25 C.F.R. § 162.5 by requiring Grace "to guarantee completion of the improvement and payment in full of claims of all persons for work performed on or materials furnished for construction," and to secure this guaranty through one of four means. A-10, Lease Agreement, p.14. Grace could furnish either: (1) the bond of a corporate surety to pay "claims for all persons for work

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[5] The regulation provides, in part:

> Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing:
>
> . . .
>
> (2) The estimated construction cost of any improvement to be placed on the land by the lessee.

performed on or materials furnished for construction"; or (2) an escrow deposit of cash or government securities "in an amount sufficient to pay the entire cost of construction," which would be used to discharge "any statutory liens for labor or material"; or (3) a construction loan agreement under which a "financial institution agrees to provide an amount sufficient to pay the entire cost of construction"; or (4) a letter of credit for the entire cost of the project, "conditioned on satisfactory completion of and payment for construction." A-10-12, pp. 14-16.

Electing not to deposit cash in escrow "until the period fixed by law for the filing of all mechanics' or materialmen's liens on such improvement shall have expired," Grace chose instead to obtain a construction loan, from which Grace promised to pay the claims of all subcontractors and suppliers on the Frontier Village project. A-11, Lease Agreement, p. 15. The loan agreement required Grace to "pay and discharge" all mechanics' liens, and provided that Grace would be in default if it failed to do so. A-22, A-25-26, Building Loan Agreement, pp. 10, 24, 36. Given this explicit language, the Ninth Circuit properly concluded that, pursuant to federal regulations and Grace's express obligation, it had been the Secretary's intention to authorize lien claimants such as Red Mountain to pursue their state law remedies against the leasehold interest of Grace. 29 F.3d at 114.

Petitioners do not dispute the Ninth Circuit's legal analysis in this case, but urge that the lower court misread the text of the Lease Agreement. Petitioners contend that the provisions permitting application of Arizona law pertain only

to the mortgage held by the Bank, and not to the lien asserted by Red Mountain. Petition at 4-7. The pertinent language of the Lease, however, is not so narrowly drafted.

Section 14 of the Lease expressly recognized Grace's right to voluntarily encumber its leasehold interest "for the purpose of borrowing for the development and improvement of the property." A-13, Lease Agreement, p. 23. Thereafter, the Lease makes repeated reference to the "approved encumbrance" of the leasehold interest whenever it discusses the rights of the construction lender. A-13-15, Lease Agreement, pp. 24-26. This restrictive language is conspicuously absent from the choice of law provision of the lease, which applies without qualification the substantive law of the State of Arizona to "*any* encumbrances."

In addition, the lease itself shows that the term "any encumbrancer" was intended to encompass more than just the Bank: the lease specifies that "any encumbrancer" "*includes, without limitation*, any rights dealing with any sale, foreclosure or other enforcement of any security instrument." Grace thus seeks to impose a limitation expressly rejected by the lease. Petitioners' argument that Arizona law was meant to apply only to the rights of the Bank must be rejected.

Nor does the Ninth Circuit's decision in this case conflict with that court's prior decision in *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir. 1983), as Petitioners contend. Petition at p. 7-8. In *Yavapai-Prescott*, the Tribe argued that the Secretary's approval of the lease implicitly suspended the operation of regulations governing

lease termination procedures. 707 F.2d at 1074. The regulations required the Secretary's participation in lease termination decisions, while the lease in that case simply referred to termination by the Tribe "and/or" the Secretary. The Ninth Circuit refused to treat approval of the lease as having "authorized suspension of the procedures required by 25 C.F.R. § 162.14," pointing out that "an agency normally is bound by its own regulations." 707 F.2d at 1076 n.5. This case does not involve any claim of "implied waiver" of a federal regulation. Rather, the Ninth Circuit held that the choice of law clause in this lease was an appropriate exercise of the authority granted by 25 C.F.R. § 1.4(b) to make state law applicable "in specific cases." Furthermore, the application of the state lien law is in furtherance of, rather than at odds with, the federal policy, as discussed above, of requiring assurances that the claims of subcontractors and suppliers will be paid. 25 C.F.R. § 162.5(c) (1962).[6] The result sought by Grace defeats that policy.

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[6] Finally, Petitioners point out that "the lease is not signed by the Secretary of the Interior; it is signed by the acting Phoenix Area Director of the Bureau of Indian Affairs." Petition at 7. From this statement, Petitioners seem to imply that the lease was not actually approved "by the Secretary, or his authorized representative," as required by federal regulation. 25 C.F.R. § 162.12(a). Petitioners cannot seriously contend that the lease in this case was not properly approved by the Secretary. Without such approval, the lease would be entirely invalid, Grace's occupation of the property would be an act of trespass, and any litigation between Red Mountain and Grace would not involve any federal issue whatsoever.

3.4 The Decision Below Gives Appropriate Deference to Tribal Interests.

Petitioners appear to concede that the Ninth Circuit correctly concluded that a foreclosure here will have no economic impact on the Tribe. Petition at 12. Petitioners argue, however, that the Ninth Circuit gave insufficient consideration to other tribal interests. A foreclosure of Red Mountain's lien, Petitioners contend, might impinge on tribal interests by allowing an unwanted stranger to become the Tribe's tenant. The Lease Agreement, however, expressly contemplates just such an event.

The lease acknowledges Grace's right to encumber the leasehold interest in order to finance construction of the shopping center. A-13, Lease Agreement, p. 24. With an encumbrance, of course, comes the possibility of foreclosure on the encumbered asset. In light of this possibility, the Lease recognizes that Grace's interest may be acquired by a previously unknown entity, either by direct purchase at the lender's foreclosure sale or by assignment from the lender. The Lease imposes no prohibition against such an occurrence, and specifically provides that:

> [I]f the purchaser at such sale is the encumbrancer, *the encumbrancer may sell and assign the leasehold interest without the consent of the lessor and/or the secretary*, provided that the assignee shall agree in writing to be bound by all the terms and conditions of the sublease agreement or this lease agreement, as applicable. If the

> purchaser *is a party other than the encumbrancer*, the purchaser may sell and assign the leasehold interest only with the written consent of the Secretary, and such purchaser shall be bound by all the terms and conditions of the sublease or this lease agreement, as applicable, and shall assume in writing all obligations thereunder.

*Id.*, A-13-16, pp. 25-26 (emphasis added). The only "burden" Petitioners claim this case imposes on the Tribe, therefore, is simply a possible occurrence the Tribe agreed to accept when it leased its property out for development.[7]

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[7] *See Basic Refractories v. Bright*, 298 P.2d 810 (Nev. 1956), rejecting the argument that foreclosure against the leasehold should be denied because the government would be "compelled against its consent to accept an unwanted tenant, such as a purchaser upon foreclosure sale." 298 P.2d at 814. After reviewing the lease, the court concluded that, as here, "the government was not concerned with a lien foreclosure and its consequent substitution of another tenant." 298 P.2d at 815.

## 4. CONCLUSION

This case is not within the Court's certiorari jurisdiction under 28 U.S.C. § 1254. Because Petitioners took no steps to stay the issuance of the lower court's mandate, this case was not "in" the court of appeals by the time the petition for certiorari was filed. Accordingly, the petition should be dismissed for want of jurisdiction.

Even if considered on its merits, the petition fails to raise an issue for which issuance of a writ of certiorari would be appropriate. Payment of mechanics' lien claims is required by federal regulation. The lease specifically obligates Grace to pay such claims. The lease provides that the rights of all encumbrancers are governed by the state law of Arizona. Red Mountain, as a mechanics' lien claimant, is such an encumbrancer, and is therefore entitled to proceed under the state mechanics' lien law.

The Ninth Circuit carefully followed existing law and issued a decision narrowly confined to the facts of the present case. The decision is consistent with the rulings of this Court and the other federal courts of appeals. Accordingly, the Petition for Writ of Certiorari should be denied.

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# APPENDIX

# APPENDIX

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# 28 U.S.C. § 1254

## § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928; June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

**§ 1.4 State and local regulation of the use of Indian property.**

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

**§ 162.5 Special requirements and provisions.**

(c) Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing:

(1) Not less than one year's rental unless the lease contract provides that the annual rental shall be paid in advance.

(2) The estimated construction cost of any improvement to be placed on the land by the lessee.

(3) An amount estimated to be adequate to insure compliance with any additional contractual obligations.

(d) The lessee may be required to provide insurance in an amount adequate to protect any improvements on the leased premises; the lessee may also be required to furnish appropriate liability insurance, and such other insurance as may be necessary to protect the lessor's interest.

**§ 33-981. Lien for labor; professional services or materials used in construction; alteration or repair of structures; preliminary twenty day notice; exceptions**

A. Except as provided in §§ 33-1002 and 33-1003, every person who labors or furnishes professional services, materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien on such building, structure or improvement for the work or labor done or professional services, materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent.

B. Every contractor, subcontractor, architect, builder or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement is the agent of the owner for the purposes of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent.

C. A person who is required to be licensed as a contractor but who does not hold a valid license as such contractor issued pursuant to title 32, chapter 10[1] shall not have the lien rights provided for in this section.

---

[1] Section 32-1101 et seq.

D. A person required to give preliminary twenty day notice pursuant to § 33-992.01 is entitled to enforce the lien rights provided for in this section only if he has given such notice and has made proof of service pursuant to § 33-992.02.

E. A person who furnishes professional services but who does not hold a valid certificate of registration issued pursuant to title 32, chapter 1,[2] shall not have the lien rights provided for in this section.

F. A person who furnishes professional services is entitled to enforce the lien rights provided for in this section only if such person has a written agreement with the owner of the property or with an architect who has a written agreement with the owner of the property.

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[2] Section 32-101 et seq.

# YAVAPAI-PRESCOTT INDIAN TRIBE/ GRACE INVESTMENT COMPANY LEASE AGREEMENT NO. 101

YAVAPAI-PRESCOTT INDIAN TRIBE/
GRACE INVESTMENT COMPANY
LEASE AGREEMENT No. 101

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7. SECURITY FOR PERFORMANCE

A. Methods of Providing Security. Before beginning construction of each improvement, the Lessee, a sublessee (which term when used herein shall include all ground sublessees whether tenants of Lessee or of sublessees of tenants of Lessee) or the contractor performing the work for the Lessee or a sublessee agrees to provide security to guarantee completion of the improvement and payment in full of claims of all persons for work performed on or materials furnished for construction. The Lessee,

a sublessee or the contractor performing the work for the Lessee or a sublessee may provide said security in any of the following forms:

(1) Posting a corporation surety bond in an amount equal to the cost of each improvement, said bond to be deposited with the Lessor and to remain in effect until the improvement is satisfactorily completed and payment has been made in full of the

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claims of all persons for work performed on or materials furnished for construction. Said bond shall be conditioned upon the faithful performance of the Lessee, a sublessee or the contractor performing the work for the Lessee or a sublessee, and give all claimants the right of action to recover upon said bond in any suit brought for that purpose;

(2) Depositing in escrow with an institution acceptable to the Lessor, negotiable United States Treasury Bonds or cash, in an amount sufficient to pay the entire cost of construction of each improvement then to be erected. The escrow instructions shall include provisions for disbursement in installments upon certification of the architect as construction progresses. The Lessor shall have access to all information relative to the disbursement of funds through said escrow. The escrow instructions shall also provide that not less than ten percent (10%) of such funds shall be withheld by the escrow holder until the period fixed by law for the filing of all mechanic's or materialmen's liens on such improvement shall have expired or until an acceptable title company issues a title insurance policy which in substance insures the Lessor against any loss it could sustain by reason of any statutory liens for labor or material arising out of any work or improvement described in said escrow instructions; that if mechanic's or materialmen's liens are filed, the funds so withheld shall then be used to discharge such liens; and that if no such liens are filed within the statutory period for filing, the withheld funds

shall be then disbursed to the party originally posting the same. Interest on said bonds shall be paid to the party posting the same.

(3) Entering into a building loan agreement with a Federally insured financial institution under which agreement, such financial institution agrees to provide an amount sufficient to pay the entire cost of construction of each improvement then to be erected.

(4) Obtaining a letter of credit payable to the Tribe from a Federally insured financial institution, in an amount sufficient to pay the entire cost of construction of each improvement then to be erected, conditioned on satisfactory completion of and payment for construction of the improvements and in a form which is satisfactory to the Tribe; or

(5) Such other method as may hereafter be mutually agreed between Lessor and Lessee.

B. Corporate Sureties. All corporate surety bonds provided by Lessee in compliance with this Lease Agreement shall be furnished by companies holding certificates of authority from the Secretary of Treasury as acceptable sureties on Federal bonds. Insurance policies shall be furnished and maintained by companies doing business in the State of Arizona, rated the equivalent of A-Plus - AAA or better by Best's Insurance Guide or otherwise approved by the Tribe.

* * *

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14. ENCUMBRANCES

Lessee's interest in this Lease Agreement, and any right to or interest in, any of the improvements on the Leased Property, may be encumbered for the purpose of borrowing for the development and improvement of the Leased Property and may be refinanced from time to time in Lessee's discretion. Any encumbrance must be confined to the fair market value of the improvements on the Leased Property and shall not jeopardize in any way

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the Lessor's interest in the land. Lessee agrees to provide Lessor and the Secretary with reasonable financial information in conjunction with any request for approval of any encumbrance. The parties agree that their mutual interests will be best served through the Lessee having the ability to enter into such encumbrances as it deems appropriate and that any required approvals will not be unreasonably withheld or delayed. The Lessor and Secretary or his designee shall approve such encumbrance instruments if it meets the requirements of the applicable statutes and regulations.

It is understood that any sublessee shall have the right to encumber its sublease for the purpose of borrowing money for the development and improvement of the property subject to the sublease without any further consent of the Lessor or the Secretary; provided that the form of the encumbrance shall be approved by the Secretary and the Tribe.

In the event of default by the Lessee of the terms of any approved encumbrance, or in the event of a default by a sublessee, the encumbrancer (the holder of the beneficial interest under a deed of trust, an assignee under an assignment of lease as security, or a mortgagee) may exercise any rights provided in the applicable encumbrance; provided that before any sale of the leasehold or subleasehold, whether under power of sale or foreclosure, the encumbrancer shall give to the Lessor notice of the

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same character and duration as is required to be given to the Lessee or a sublessee by such encumbrance and any applicable laws of the State of Arizona. In the event of a default under an approved encumbrance of this lease (but not any encumbrance of a sublease), Lessor shall, upon request by the encumbrancer, suspend and waive all rental payments due to Lessor by Lessee for a period not to exceed twelve (12) months from the date of default; provided, however, that once such suspension and waiver has occurred, no additional period of suspended payments will be

granted by Lessor until such time as all rental payments and interest under any previous suspensions have been satisfied and cured in full. Any such suspended rental payments shall be paid in full with interest at the rate of twelve percent (12%) no later than thirty-six (36) months from the date of default.

If any sale under an encumbrance of a sublease or an approved encumbrance of the leasehold granted hereunder occurs, whether by power of sale or foreclosure, the purchaser at such sale shall succeed to all of the rights, title and interest of the Lessee or a sublessee in the leasehold interest covered by said encumbrance. It is further agreed that, if the purchaser at such sale is the encumbrancer, the encumbrancer may sell and assign the leasehold interest without the consent of the Lessor and/or the Secretary, provided that the assignee shall agree in writing to be bound by all the terms and conditions of the sub-

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lease agreement or this Lease Agreement, as applicable. If the encumbrancer is the purchaser, it shall be required to perform this lease or any sublease, as applicable, only so long as it retains title thereto. If the purchaser is a party other than the encumbrancer, the purchaser may sell and assign the leasehold interest only with the written consent of the Secretary, and such purchaser shall be bound by all the terms and conditions of the sublease or this Lease Agreement, as applicable, and shall assume in writing all obligations thereunder.

In the event of a default under an approved encumbrance of this Lease, and after notice of sale by the approved encumbrancer has been given as above provided, if the default upon which notice of sale is based shall continue for sixty (60) days without being cured by the holder of the leasehold estate, Lessor shall have the right to cure such defaults at any time prior to foreclosure, and to discharge the approved encumbrance by paying to the encumbrancer the amount of principal and accrued interest which remain unpaid. In such event, Lessor may then elect to terminate this Lease; provided, however, if any subleases

exist at such time. Lessor may not terminate this Lease unless Lessor agrees in writing to recognize the sublease as if Lessor were the original lessor thereunder and covenants to grant all such sublessees' quiet possession of their respective subleaseholds for so long as such sublessees attorn to and pay their rents to Lessor and otherwise abide by the terms of their respective sublease agreements. The foregoing provision shall not be construed

* * *

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29. WAIVER OF SOVEREIGN IMMUNITY

Lessor agrees that this Lease (as it applies to the subject property), and any encumbrances thereof, and any subleases, assignments or other contracted agreements with respect thereto (hereinafter collectively referred to as the "Legal Documents") shall be construed in accordance with the substantive law of the State of Arizona except in instances where the laws of the United States must govern (except to the extent that such United States law incorporates Tribal law or custom), in which instances the Legal Documents shall be construed in accordance with and governed thereby. Any controversies or disputes arising under the Legal Documents, except as to those which the parties may hereafter agree may be determined by arbitration, may be determined and adjudicated in the United States District Court for the District of Arizona or in the event the federal court shall refuse jurisdiction or the parties shall not be entitled to such jurisdiction, the Arizona Superior Court, Yavapai County. For the

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purposes of this paragraph and subject to the condition hereinafter contained, Lessor hereby (for only the benefit of any of the parties hereto and their successors and assigns, including without limitation, all assignees, licensees, sublessees and the respective encumbrancers of all such parties) waives any immunity it may possess and hereby submits itself to the jurisdiction of the aforesaid courts and expressly (i) waives and relinquishes any right

it may have to have any controversy or dispute arising under the Legal Documents determined in any Tribal court or under Tribal law or custom, and (ii) covenants that it will not in any manner seek to have the Legal Documents or its rights or obligations thereunder or hereunder enforced or adjudicated in any Tribal court or under Tribal law. The United States and Arizona courts set forth above, as the agreed forums for controversies hereunder, shall not be bound by any Tribal law, regulations, ordinances or custom in construing the Legal Documents or adjudicating the rights of the parties thereunder. Lessor hereby waives and relinquishes any Tribal jurisdiction it might have relative to the enforcement or adjudication of rights between Lessor and Lessee or any encumbrancer, sublessee or assignee of Lessee, or to have any such rights enforced, adjudicated or enjoined in Tribal courts or under Tribal law or custom. Lessor agrees that any encumbrancer of Lessee's interest or that of any sublessee or assignee and the rights of any encumbrancer with respect thereto (including, without limitation, any rights dealing with any sale, foreclosure or other enforcement of (or under)

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any security instrument, or executed and delivered in connection therewith) may be governed by the laws of the State of Arizona or, to the extent applicable, the laws of the United States. In entering into the agreements and waivers contained in this paragraph, Lessor acknowledges that such agreements and waivers are made, in part, to induce Lessee to enter into a development lease. Nothing in this paragraph shall limit, or be deemed to limit, any party's right to appeal any judgment to any appropriate federal or state appellate court. Nothing in this paragraph shall be construed to require any party or encumbrancer to resort to any judicial forum to enforce any of its rights hereunder or under any security instrument executed or delivered in connection herewith, if the same are enforceable without resort to judicial action. Notwithstanding anything in this paragraph to the contrary, it is understood and agreed that any relief sought against Lessor may

only be for declaratory judgment and injunctive relief and a money judgment; provided, however, no money judgment shall be entered against the Lessor unless it shall be specifically made enforceable only by set-off against sums due or to become due by Lessee or an assignee or sublessee or the respective encumbrancers of such parties to Lessor. The Tribe's consent to jurisdiction herein given shall not be construed to give the court jurisdiction to enter a money judgment against the Tribe which is enforceable by execution, garnishment or in any other manner, except by set-off against sums due or to become due to Lessor. Lessor and Lessee agree that any termination proceeding

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shall be conducted in accordance with and governed by the rules and regulations set forth in the United States Code of Federal Regulations and any applicable federal judicial decisions relative to this type lease agreement. In the event that the provisions for waiver of sovereign immunity set forth herein shall be held to be void or unenforceable, then whenever during the term of this Lease, Lessor and Lessee are unable to reach an agreement with respect to any matter in dispute, and if by reason of the exercise by Lessor of its sovereign immunity or for any other reason the forums of the federal and state courts are unavailable, then and in any such event such matter in dispute shall be submitted to arbitration under the then applicable rules of the American Arbitration Association. Lessor and Lessee agree to be bound by any final award entered pursuant to such arbitration, which award may include an assessment of costs and/or attorneys' fees.

Excerpts from Building Loan Agreement

# BUILDING LOAN AGREEMENT

Between

GRACE INVESTMENT COMPANY
as Borrower

and

CANADIAN IMPERIAL BANK OF COMMERCE
as Lender

October 31, 1990

# BUILDING LOAN AGREEMENT[1]

IN CONSIDERATION of the covenants herein contained, Lender (defined below) agrees to lend to Borrower (defined below), and Borrower agrees to borrow from Lender, up to the full amount of the Loan hereinafter described, on the terms and conditions of this Building Loan Agreement ("Agreement") as follows.

## Article 1 - Fundamental Provisions

1.1 Purpose: This Article 1 sets forth certain fundamental provisions for purposes of this Agreement.

1.2 Date of this Agreement: October 31, 1990.

1.3 Lender: CANADIAN IMPERIAL BANK OF COMMERCE, a Canada chartered bank acting by and through its Atlanta Agency.

1.4 Borrower: GRACE INVESTMENT COMPANY, an Arizona corporation.

1.5 Loan: A construction loan to be made by Lender to Borrower, subject to the terms of this Agreement and the other Loan Documents, in the principal amount of up to $_____ ("Principal Amount"), together with all interest thereon and any additional advances related thereto.

1.6 Borrower's Funds at Recordation: None.

1.7 Property: That certain real property located in the County of Yavapai, State of Arizona, more particularly described on Exhibit "A" attached hereto.

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[1] The amount of the loan does not appear in the record. Grace and the Bank refused to produce the loan documents until ordered to do so. The District Court ordered the documents produced, but allowed Grace and the Bank to redact all figures reflecting loan amounts, interest rates, etc.

1.8 Improvements: A community shopping center of approximately 275,000 square feet to be known as "Frontier Village Center" (the "Project").

1.9 Commencement Date: That date which is seven days after the date of this Agreement as shown above.

1.10 Completion Date: That date which is eight months from the Commencement Date.

1.11 Change Order Amount: $_____

1.12 Aggregate Change Order Amount: $_____

1.13 Architect: Ellerman & Schick and Associates.

1.14 General Contractor: Borrower.

* * *

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Article 5 - Conditions Precedent to Disbursement

5.1 In General. Lender shall have the election to make disbursements upon the satisfaction of the following conditions precedent, and neither Borrower nor any third party including, without limitation, any guarantors, any construction manager, any subcontractors, materialmen, the Architect or any junior lienholders shall be entitled to rely on the satisfaction or non-satisfaction of such conditions precedent for purposes of determining the priority of any disbursement made pursuant to this Agreement:

5.1.1 All Conditions to Recordation shall have been satisfied, and Recordation shall have occurred.

5.1.2 There shall exist no Event of Default nor any event, omission or failure of a condition which would constitute an Event of Default after notice or the lapse of time or both.

5.1.3 All representations and warranties of Borrower made in this Agreement or in any of the other Loan Documents shall be true and correct as of the date of the disbursement with the same effect as if made on such date.

5.1.4 The Loan shall be In Balance as defined in Article 6 hereof.

5.1.5 Borrower shall have delivered to Lender all funds, documents, instruments, policies, evidence of satisfaction of conditions and other materials requested by Lender under the terms of this Agreement or any of the other Loan Documents.

5.1.6 All requirements for the particular disbursement set forth in the Disbursement Schedule and other applicable sections of this Article 5 shall have been met.

5.1.7 If the disbursement is for any Tenant Improvements, Lender shall have received and approved: (a) the original or signed counterpart of the lease or leases pursuant to which such Tenant Improvements have been installed; (b) if requested by Lender, all plans and specifications for such Tenant Improvements signed or initialed by Borrower, the applicable architect, contractor, tenant and other Persons, as Lender may

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require; and (c) such line item breakdowns of the costs incurred for such Tenant Improvements as Lender may request.

5.2 Initial Disbursement. Prior to the Initial Disbursement, and as conditions precedent thereto subject to the election of Lender in Section 5.1 hereof:

5.2.1 All conditions precedent set forth in Paragraph 5.1 shall have been satisfied.

5.2.2 The Title Insurer shall have issued or committed to issue the Title Policy.

5.2.3 A Form UCC-1 financing statement shall have been filed with the Secretary of State for the State of Arizona, and Lender shall have been furnished with a certificate issued by the Secretary of State showing Lender's UCC-1 financing statement as prior to all other UCC-1 financing statements in Borrower's name related to the Personal Property.

5.2.4 A Form UCC-1 financing statement shall have been filed or recorded with the County Recorder or other

appropriate official of Yavapai County if required by law in order to perfect the security interest in the Personal Property.

5.2.5 Unless this requirement is waived in writing by Lender, Borrower shall require each subcontractor whose subcontract calls for payment of more than $150,000 to post a performance and completion bond prior to commencing work. Any bond required hereunder shall be recorded in the Office of the County Recorder of Yavapai County prior to the commencement of the subcontractor's work on the Improvements.

5.2.6 Prior to the delivery to Lender of complete Plans and Specifications and their approval by Lender, Lender shall not be required to make disbursements under this Loan Agreement exceeding in the aggregate the amount of the Letter of Credit.

5.3 Subsequent Disbursements. Prior to each Subsequent Disbursement, and as conditions precedent thereto, subject to the election of Lender in Section 5.1 hereof:

5.3.1 All conditions precedent set forth in Paragraphs 5.1 and 5.2 shall have been satisfied.

5.3.2 If required by Lender, the Title Insurer shall have agreed to issue an endorsement to the Title Policy insuring Lender that: (a) since the previous disbursement by Lender or issuance of insurance related thereto, there has been no change in the condition of title; (b) there are no intervening liens or encumbrances which may then or thereafter take priority over the disbursement to be made; and (c) there are no survey

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exceptions not theretofore approved by Lender.

5.3.3 Upon the completion of foundations for the Improvements, the Title Insurer shall have issued its foundation endorsement insuring Lender that each foundation is constructed wholly within the boundaries of the Property and does not encroach on any easements or violate any covenants, conditions or restrictions of record.

5.3.4 The Improvements shall not have been injured or damaged by fire or other casualty, unless Lender shall have received insurance proceeds sufficient, in its judgment, to restore the improvements and to permit the completion of the Improvements prior to the Completion Date specified in Section 1.10.

5.3.5 Lender shall have received certification from the Architect and/or Lender's Consultant that: (a) the Work with respect to which the disbursement has been requested has been completed in accordance with the Plans; (b) barring then unforeseen and unknown delays, the then existing state of construction of the Improvements will permit the Completion of the Improvements on or before the Completion Date; and (c) the costs remaining to be paid to complete the Project will not exceed the Undisbursed Loan Amount.

5.3.6 Lender shall have received unconditional lien releases upon progress payments from each contractor, subcontractor and supplier of materials and services, with respect to whom any previous disbursement has been made by Lender, confirming each such Person's receipt of its proper share of each such previous disbursement and its waiver of any further claim to the extent thereof.

5.4 Retainage Disbursement. Prior to the Retainage Disbursement, and as conditions precedent thereto, subject to the election of Lender in Section 5.1 hereof:

5.4.1 All conditions precedent set forth in Sections 5.1 through 5.3 shall have been satisfied.

5.4.2 Lender shall have received certification from the Architect and/or Lender's Consultant that the Improvements have been substantially completed in accordance with the Plans.

5.4.3 Borrower shall have recorded a valid notice of completion of the Improvements.

5.4.4 Such additional policies or endorsements shall have been issued by the Title Insurer as Lender may reasonably require, with a liability limit of not less than the

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Principal Amount, and with coverage and in form satisfactory to Lender, insuring Lender's interest under the Deed of Trust as a first lien on the Borrower's leasehold interest in the Property without exception for mechanic's or materialmen's liens and claims, excepting only such matters as shall have been approved in writing by Lender.

5.4.5 Borrower shall obtain and deliver to Lender evidence of approval of the Improvements in their entirety for permanent occupancy by all applicable Governmental Authorities, and by any applicable Board of Fire & Underwriters or its equivalent.

The Retainage Disbursement may be made upon completion of the Improvements and satisfaction of the conditions specified in this Section 5.4 with respect thereto, notwithstanding the fact that Tenant Improvements have not been completed, but in any such event the Final Disbursement shall be made in the same manner as funds were disbursed for the payment of other costs of construction of the Improvements and as provided in this Agreement and the Disbursement schedule with respect to Tenant Improvements.

5.5 Disbursements for Offsite Materials. In no event shall Lender be obligated to make any disbursements of Loan proceeds to pay for any materials connected with the construction of the Improvements unless and until such materials are delivered to the Property or are incorporated in the Project. If Lender in its sole discretion makes a disbursement for materials stored off-site, all of the requirements of Section 5.3 shall be applicable to such disbursement (in addition to other requirements for disbursements contained herein). Notwithstanding the foregoing, in no event shall Lender be obligated to disburse Loan proceeds with respect to materials stored offsite in excess of $_____.

5.6 Disbursements for Materials Stored On-Site. Any requests for disbursements which in whole or in part relate to materials, equipment or furnishings which Borrower owns and which are not incorporated into the Improvements as of the date of the request for disbursement, but are to be temporarily stored at the Property, shall be made to the extent the request relates to such stored materials so long as the request is accompanied by (i) proof that such stored materials are included within the coverages of insurance policies carried by Borrower or proof of other insurance which has been approved by Lender, (ii) evidence reasonably satisfactory to Lender that the ownership of such materials is invested in Borrower free of any liens and claims of third parties, (iii) evidence reasonably satisfactory to Lender that such materials are protected against theft or damage, and (iv) evidence reasonably satisfactory to Lender that the materials used in the construction of the Project are not commodity items but are uniquely fabricated for the

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construction. Lender may require a separate security agreement and Uniform Commercial Code financing statements to cover any such materials, equipment or furnishings so stored at the Property and such other information and assurances as Lender may reasonably require.

* * *

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8.10 Liens. If any claim of lien is recorded which affects the Property or Improvements, Borrower shall, within twenty (20) days after such recording, or within five (5) days after Lender's demand, whichever last occurs: (a) pay and discharge the same; (b) effect the release thereof by recording or delivering to Lender a surety bond in form and amount satisfactory to Lender, or (c) provide Lender with other assurance which Lender, in its sole discretion, deem to be satisfactory for the payment of such lien and for the full and continuous protection of Lender from the effect thereof.

* * *

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12.12 Liens. The filing of any lien against the Property or Improvements, if the claim of lien continues for twenty (20) days without discharge, satisfaction or the making of provision for payment to the satisfaction of Lender.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 91-1840 PHX CAM

RED MOUNTAIN MACHINERY COMPANY,
Plaintiff,

v.

GRACE INVESTMENT COMPANY, et al.,
Defendants.

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ORDER

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Having considered plaintiff's motion to remand, the Court concludes as follows:

**Procedural Background**

On October 22, 1991, Red Mountain filed this action in Yavapai County Superior Court seeking foreclosure of the leasehold interest in the real property leased by Grace from the Tribe. The defendants subsequently removed the action to this court. Defendants filed a motion for judgment on the pleadings arguing that the Arizona lien law is preempted by the pervasive Federal statutory and regulatory control of leases involving Indian land. The Court converted the motion to a motion for summary judgment and found that the Arizona lien law is preempted by federal laws. The Ninth Circuit has reversed stating that there is no preemption in this case. *Red Mountain Mach C. v. Grace Inv. Co.*, Slip Op. at 7877 (9th Cir. 1994). Thus, the only remaining claim seeks lease foreclosure under Arizona law and there is no federal question jurisdiction.

Plaintiff has filed a motion to remand arguing that, in light of the Ninth Circuit ruling regarding preemption, this court lacks subject matter jurisdiction.

**Discussion**

Relevant to this motion, 28 U.S.C.A. § 1447(c) provides:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . .

28 U.S.C.A. § 1447(c)(1994). Because the Ninth Circuit has determined that there is no federal preemption of the Arizona lien law in this case, there is no federal question subject matter jurisdiction. In addition, it is clear that there is no diversity of citizenship. Therefore, there is no federal subject matter jurisdiction in this case. As the claim was removed only on the basis that federal Indian law preempted the state law, the Ninth Circuit's ruling makes it clear that this court lacks federal question subject matter jurisdiction or even supplemental jurisdiction over the state law claim in this action.

IT IS THEREFORE ORDERED THAT plaintiff's motion to remand [9/28/94] is granted. The Clerk of Court shall remand this action to state court.

DATED this 21 day of October, 1994.

/s/
C.A. Muecke
U.S. District Judge